Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

JAMES B. ROSS,

Petitioner,

v.

RAILCAR AMERICA, INC., RAILCAR AMERICA GROUP DISABILITY INCOME PLAN, and THE CANADA LIFE ASSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. An insured ERISA employee benefit plan requires amendments to be written, attached to the policy, and signed by certain officers of the insurer. Purported amendments do not comply with these requirements. The lower courts nevertheless found the amendments to be valid. The various justifications the lower courts gave in validating the amendments raise these questions: Is this Court's unanimous decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), requiring amendments to comply with plan amendment procedures, overruled or mitigated by this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002)? Can the courts mischaracterize an ERISA §502(a)(1)(B) amendment-invalidation claim as an equitable action arising under ERISA §502(a)(3), so that *Knudson* can be said to apply? Is a party with no connection to an amendment-invalidation claim nevertheless indispensable to that claim? Is plaintiff responsible for arranging legal representation of defendants? Can courts invent their own amendment provisions? Can inherently speculative testimony regarding the insurer's routine practices establish ERISA amendments? Can foundation testimony which is ambiguous and possibly untrue establish ERISA amendments? Does the Canada Business Corporation Act govern the admissibility of evidence before United States federal courts? Must amendment-invalidation plaintiffs show harm beyond the plan's noncompliance with its own amendment provision?

2. Can documents that were requested to be, but were not, provided during administrative review of plaintiff's claim establish the validity of an ERISA amendment?

3. If a plan withholds requested documents under which the plan is being operated, is ERISA §502(c)(1) inapplicable solely because the withheld documents are legally invalid? Is the plan administrator that can be liable for such damages the party that is generally, or specifically, identified as the plan administrator?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on April 9, 2002, and it appears at 285 F.3d 735 (8th Cir. 2002) and at Appendix (hereafter "App.") A. The District Court's memorandum and order was issued on June 15, 2000. It is unpublished, and it is set out at App. B. The Eighth Circuit's order denying petition for rehearing and for rehearing en banc was entered on May 16, 2002 and appears at App. C.

JURISDICTION

The opinion of the Eighth Circuit Court of Appeals was issued on April 9, 2002. That court denied the petition for rehearing and rehearing en banc on May 16, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

The statutes involved are: ERISA §§ 3(16)(A)(i), 104(b)(2), 104(b)(4), 402(a)(1), 402(b)(3), 502(a)(1)(B), 502(a)(3), 502(c)(1), 502(d), and 503 (29 U.S.C. §§ 1002(16)(A)(i), 1024(b)(2), 1024(b)(4), 1102(a)(1), 1102(b)(3), 1132(a)(1)(B), 1132(a)(3), 1132(c)(1), 1132(d), and 1133); 28 U.S.C. § 1254(1); 28 U.S.C. § 1746; and § 266 of the Canada Business Corporation Act. The text of the statutes is set out at App. D.

The regulations involved are: 29 C.F.R. §§ 2560.503-1(g)(1)(ii) and 2560.503-1(h)(1)(i). The text of the regulations is set out at App. E.

STATEMENT OF THE CASE

A. Amendment Invalidity Claim

Mr. Ross is a disabled former welder who was covered by a group disability income plan. The plan was maintained by his former employer, Rail Car America, Inc. (hereafter "Rail Car"). The plan is subject to ERISA. The plan's only asset was a group disability insurance policy issued to the plan by The Canada Life Assurance Company (hereafter "Canada Life"). Mr. Ross paid the entire premium cost for his coverage.

Mr. Ross became disabled due to colon cancer in early 1991. The plan found him to be disabled and Mr. Ross began receiving plan benefits in 1992.

In 1997, the plan denied Mr. Ross' continuing qualification for plan benefits. The plan based its denial on certain purported amendments to the plan that were purportedly adopted in 1990 and 1991. In the absence of those amendments, Mr. Ross was entitled to receive 66% of his pre-disability wages until he turned age 65. The purported amendments would limit those benefits to 60% of pre-disability wages, and for only 60 months of payments. The latter restriction would preclude Mr. Ross from receiving any additional benefits, which would reduce by about 17 years the period of time over which he otherwise would be paid benefits under the plan.

The insurance contract issued to the plan by Canada Life contained a very detailed and specific amendment procedure. It required four things of any policy amendments:

1. A writing;
2. Attached to the policy;
3. Containing a signature or a facsimile signature of Canada Life's president, secretary, or chief actuary; and
4. Containing an actual signature of Canada Life's registrar or assistant registrar.

In the process of exhausting his administrative remedies, Mr. Ross requested from Canada Life plan documents with amended pages complying with the four requirements. No documents were provided that comply with the requirements. Documents that Canada Life provided, and asserted were the pertinent documents, contained purported amended pages with no signatures of any sort: not original signatures, not facsimile signatures, not signatures in any other condition. In short, Canada Life's documents did not comply with the third or fourth requirements listed above.

After suit was filed, Rail Car provided some pages that appeared to be photocopies of separate signature pages for the purported amendments. Those pages arguably contain a facsimile signature of Canada Life's secretary, but they indisputably do not contain an actual signature of Canada Life's registrar or assistant registrar. In addition, Rail Car's pages were not attached to Canada Life's policy. That was impossible, because Canada Life kept its policy in either Atlanta, Georgia or Toronto,

Ontario, Canada, and Rail Car kept its pages in or near San Francisco, California. In short, Rail Car's pages did not comply with the second or fourth requirements of Canada Life's amendment provision.

Mr. Ross therefore initiated suit under § 502(a)(1)(B) of ERISA and sought summary judgment that the amendments were invalid. Both the District Court and the Eighth Circuit Court of Appeals found that the amendments were valid, despite no document complying with more than half of the amendment requirements. The courts ruled: that the employer, Rail Car, is indispensable to an amendment-invalidation claim under § 502(a)(1)(B) of ERISA, even though Rail Car has nothing to do with amendments and would bear no liability if amendments are invalidated; that Mr. Ross is responsible for arranging legal representation of the defendants; that Mr. Ross' claim is an equitable action for reformation of the policy or enforcement of ERISA which arises under § 502(a)(3) of ERISA, rather than an amendment-invalidation claim which arises under § 502(a)(1)(B) of ERISA; that this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (hereafter "*Knudson*") therefore applies to this case; that *Knudson* overrules or mitigates this Court's unanimous decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) (hereafter "*Curtiss-Wright*"), in which this Court unanimously held that ERISA plans must observe their own amendment provisions; that *Knudson* authorizes judicial rewriting of ERISA plan amendment procedures; that inherently speculative routine practice testimony under Federal Rule of Evidence 406 can establish the validity of amendments that ERISA demands be in writing; that the foundation testimony for the routine practice testimony

can be, at the very best, completely ambiguous, and quite possibly untrue; that the Canada Business Corporation Act, not Federal Rule of Civil Procedure 56 nor 28 U.S.C. § 1746, governs the admissibility of summary judgment evidence before United States federal courts; and that amendment-invalidation claimants must show some "harm" beyond the plan's noncompliance with its own amendment provision.

B. Administrative Record/Plan Document Request Claims

During administration of his claim, Mr. Ross requested copies of all plan documents. Canada Life provided a copy of its policy with purported amended pages containing no signatures of any sort. Mr. Ross requested clarification, and Canada Life asserted it had provided all relevant plan documents. Mr. Ross again requested clarification, and Canada Life did not even respond. Canada Life also refused to issue a final written decision on administrative review of Mr. Ross' claim.

After suit was filed, and during discovery, Canada Life provided over 1,100 pages of additional documents for the first time ever. Mr. Ross requested that Canada Life identify which of those documents it believed supported its contention that its policy was amended. Canada Life asserted that all 1,100-plus pages were relevant for that purpose.

Mr. Ross then amended his complaint to seek statutory damages under § 502(c)(1) of ERISA. He further objected to the court's consideration of any of the withheld documents.

The district court refused to award damages. It cited a line of cases holding that Canada Life was not named as administrator of the plan and therefore could not be liable for such damages. The court also admitted the withheld documents into evidence and in fact based its summary judgment ruling on several pages of the withheld documents. The Eighth Circuit generally affirmed this result.

REASONS FOR GRANTING THE WRIT

A. Amendment Invalidity Claim

The lower courts' decisions completely flout this Court's unanimous ruling in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) (hereafter "*Curtiss-Wright*"). In that decision, this Court stated that an ERISA employee benefit plan can be amended only if it observes the specific requirements of its own amendment procedure:

> "[W]hatever level of specificity a company ultimately chooses, in an amendment procedure * * * *it is bound to that level*" (emphasis added). 514 U.S. at 85.

In *Inter-Modal Rail Employees Assn. v. Atchison, Topeka and Santa Fe Railway Co.*, 520 U.S. 510 (1997) (hereafter "*Inter-Modal Rail*"), this Court reiterated and reconfirmed this rule:

> "An employer may, of course, retain unfettered right to alter its promises, but to do so *it must follow the formal procedures set forth in the plan.* * * * Adherence to these formal procedures 'increases the likelihood that proposed plan amendments, which are fairly serious events, are

> recognized as such and given the special consideration they deserve'" (emphasis added). 520 U.S. at 515-16.

Canada Life imposed on itself four requirements to amend its policy. Canada Life's documents do not comply with two of the requirements, and Rail Car's documents do not comply with two of the requirements. Applying this Court's unequivocal and twice-unanimously-adopted rule to these facts should be simple: Canada Life did not comply with the level of specificity it imposed on itself. Its purported amendments are therefore invalid.

The Eighth Circuit instead invented a new rule: close (which, in this case, is at best "two-out-of-four") is good enough.

We believe this alone constitutes a sufficient basis for this Court's consideration of this matter. The Eighth Circuit's total disregard of two unanimous and controlling decisions of this Court by itself satisfies this Court's Rule 10(c) basis for granting a writ of certiorari ("a United States court of appeals has decided an important question of federal law * * * in a way that conflicts with relevant decisions of this Court").

Moreover, the reasoning and manner by which the lower courts completely ignored this Court's unanimous decisions in *Curtiss-Wright* and *Inter-Modal Rail* also supply an additional basis for this Court's intervention. This Court's Rule 10(a) identifies the following as a basis for this Court granting a writ of certiorari:

> "a United States Court of Appeals has so far departed from the accepted and usual course of

> judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's supervisory powers."

The lower courts substantially departed from accepted and usual judicial proceedings in a number of significant ways, to wit:

1. Mr. Ross' claim is for reformation of the policy or enforcement of ERISA; it is not an amendment-invalidation claim. The first departure from usual judicial proceedings is the Eighth Circuit's mischaracterization of the nature of Mr. Ross' claim. The court states that Mr. Ross' amendment-invalidation claim is an equitable action under § 502(a)(3) of ERISA to reform the policy or to enforce the amendment provision of ERISA. App. A-8 to A-10. This is absolutely and obviously incorrect.

If this plan had *failed to contain* an amendment provision in violation of § 402(b)(3) of ERISA, Mr. Ross could have sought equitable relief under § 502(a)(3) of ERISA to force the plan to add an amendment provision where none existed before. That simply is not Mr. Ross' claim. His claim is that the plan does indeed already contain a very clear and detailed amendment provision, and that amendment provision should be controlling of the result in this case.

This very obvious mischaracterization of Mr. Ross' claim serves the Eighth Circuit's purpose of defeating this Court's unanimous decision in *Curtiss-Wright*. By mischaracterizing Mr. Ross' claim as one arising under § 502(a)(3) of ERISA, it allows the Eighth Circuit to cite this Court's decision in *Great-West Life & Annuity Ins. Co.*

v. Knudson, 534 U.S. 204 (2002) (hereafter "*Knudson*"), which the Eighth Circuit somehow interprets as allowing courts to completely ignore plan amendment provisions and instead to invent their own.

2. A party is indispensable even if it has no connection to the claim. The second departure from usual judicial norms is the Eighth Circuit's holding that a party with absolutely no connection whatsoever to a claim is nevertheless indispensable to the claim. App. A-9. The Eighth Circuit states that Mr. Ross' amendment invalidation claim cannot proceed under § 502(a)(1)(B) of ERISA because the named general administrator of the plan was not retained as a party defendant. It was not enough that the plan itself, and the insurer whose policy was the only asset of the plan, remained defendants. Compare this with § 502(d) of ERISA, which provides that the plan is the primary defendant, and other parties may also be liable if the parties' individual liability is demonstrated.

It is undisputed that the amendment provision is the insurer's provision in the insurer's policy, and the Eighth Circuit itself found that only the insurer needed to take action to amend its own policy. App. A-12, note 8. The named general plan administrator, Rail Car, had absolutely nothing to do with amendment of this plan, and would bear absolutely no liability if the plan were found not to be properly amended.

How the dismissal of Rail Car as a defendant can defeat Mr. Ross' § 502(a)(1)(B) claim, when Rail Car had nothing whatsoever to do with amendments and would bear no liability if amendments are invalidated, is simply baffling. The Eighth Circuit's reasoning on this issue,

which is relegated to footnote 7 of its opinion (App. A-11), cites no legal authority whatsoever for this conclusion.

3. Plaintiff is responsible for arranging legal representation of the defendants. As just mentioned, Mr. Ross in fact did, very carefully, name the plan as a defendant in his amendment-invalidation claim. The Eighth Circuit did feel obligated to grapple with that fact. Its resolution is as follows:

> While the plan is named as a defendant and was served with process, it is nevertheless only *nominally named* as a defendant. This is shown by the fact that the plan did not engage counsel to defend against Mr. Ross' claim. That shows that Mr. Ross' claim *really* is a claim against only the insurer, which ERISA will not countenance. App. A-9.

The moral of this discussion of the Eighth Circuit is: plaintiffs are in control of how defendants decide to defend lawsuits. Suing and serving the plan is simply not enough. Plaintiffs must also actually exercise complete control over which defendants hire attorneys to defend the claim.

4. Knudson overrules or mitigates Curtiss-Wright. We now reach the pivotal point in the Eighth Circuit's analysis. The court finds that under § 502(a)(3), as interpreted by *Knudson*, equitable relief is narrow, circumscribed, limited relief; it is relief that is less than full legal relief. The court somehow concludes that it therefore cannot enforce the amendment provision that Canada Life placed in its own policy. App. A-11 to A-14. That, of course, is at diametric odds with this Court's

unanimous decision in *Curtiss-Wright*, which states that ERISA plan amendment provisions must be enforced with the same level of specificity that they are drafted. The Eighth Circuit apparently believes that *Knudson* overrules or mitigates *Curtiss-Wright*, even though *Knudson* does not involve a dispute even remotely similar to an amendment-invalidation claim; *Knudson* nowhere even mentions *Curtiss-Wright*; the amendment-invalidation claim in *Curtiss-Wright*, as in this case, arose under § 502(a)(1)(B) of ERISA; and the claim in *Knudson*, involving a subrogation issue, arose under § 502(a)(3) of ERISA.

5. Knudson authorizes judicial rewriting of amendment provisions. The Eighth Circuit next jettisons any concern regarding the supposedly narrow, circumscribed limitations of equity; and it actually does precisely that which it accused Mr. Ross of requesting: it completely "reforms" the contract by ignoring the contract's amendment provision and replacing it with the court's own amendment provision.

Let us recall what the contract requires: a writing, attached to the policy, bearing the original or facsimile signature of one of certain officers, and bearing the original signature of one of certain other officers.

What the Eighth Circuit finds satisfies these requirements instead are: the fact that purported amended pages were consecutively paginated; the fact that they bore effective dates; and the fact that they superseded prior language. App. A-14.

In short, the Eighth Circuit completely rewrites the policy's amendment provision, under the supposedly narrow, circumscribed, and limited equitable powers of

ERISA § 502(a)(3) as interpreted by *Knudson*, and thereby completely eviscerates this Court's unanimous holding in *Curtiss-Wright*.

6. Inherently speculative "routine practice" testimony can establish an ERISA amendment on summary judgment. The Eighth Circuit found that *Knudson* authorized that court to completely ignore Canada Life's policy and to create an entirely new amendment provision. Apparently recognizing the precariousness of this position, the Eighth Circuit sought to enlist some extra support from the decision of the district court. App. A-14.

In its decision, the district court found that Canada Life in fact did comply with the four requirements of its amendment provision. App. B-11. As previously mentioned, it is undisputed that the only copy of its own policy that Canada Life provided to Mr. Ross contained purported amended pages with absolutely no signatures of any sort, not original signatures, not facsimile signatures, not signatures in any other condition. The question obviously arises, how could the district court possibly conclude that Canada Life complied with its own amendment procedure?

The answer is this. Canada Life's senior in-house counsel offered an affidavit that Canada Life's standard *practice* in 1990 and 1991 was to properly execute policy amendments, and the affidavit concluded that properly-executed amendments therefore "would have been" attached to Canada life's policy. The district court accepted that testimony as conclusive proof, meeting summary judgment standards, that the policy's amendment

requirements were therefore in fact satisfied in this case. App. B-11.

Completely lost on both of the lower courts is the utter incoherence of this argument. Canada Life was the repository of its own policy. If Canada Life "would have" followed all of its own procedures, then signature pages for the amendment pages "would have" been attached to its policy. When Canada Life photocopied its policy and sent those copies to Mr. Ross, the photocopied policy "would have" contained not only the purported amended pages, but also the signature pages, and this lawsuit likely never "would have" occurred. In short, Canada Life's testimony actually demonstrates that in this case, it did not follow its own amendment procedure.

Also completely lost on both of the lower courts is the fact that routine practice evidence under Federal Rule of Evidence 406 is merely "relevant to prove that the conduct of the * * * organization on a particular occasion was in conformity with * * * routine practice." Such evidence therefore only raises a question of fact, which question of fact must be resolved by a trier of fact. The court cannot resolve such a factual issue on a summary judgment motion, which by definition must show that there is no genuine issue as to any material fact.

Also lost on both courts is ERISA § 402(a)(1), which requires ERISA plans to be established and maintained pursuant to written instruments. The legislative history to this section demonstrates the extraordinary importance the drafters of ERISA placed on written documents:

> "Under the labor provisions of the conference substitute, every covered employee benefit plan

> (both retirement and welfare plan) is to be established and maintained in writing. A written plan is to be required in order that *every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan*" (emphasis added).

H. R. Rep. No. 93-1280, p. 297 (1974).

The very notion of establishing an ERISA amendment by testimony of any sort is totally anathema to the most basic principles of ERISA, and dozens of courts in dozens of cases have so held.

In short, we do not believe the accepted or usual judicial practice is to base summary judgment regarding the validity of amendments, required by ERISA to be in writing, on inherently speculative affidavit testimony that proves the opposite of what it is offered to prove. All such concerns, however, are summarily dismissed by the Eighth Circuit employing the expedient of relegating these matters to the category of mere evidentiary concerns not worthy of consideration by that court. App. A-14.

7. Even testimony that a licensed attorney swears is based on personal knowledge, but which Martindale-Hubbell Law Directory listings indicate may not be, can establish an ERISA amendment. Even more astonishing is this: the inherently speculative testimony regarding Canada Life's "routine practices" was given by a licensed attorney who swore he had personal knowledge of his speculations; Martindale-Hubbell Law Directory listings place that attorney in the employ of an entirely different insurance company at the relevant time;

the Eighth Circuit was made aware of this fact; and that court did nothing about it.

As mentioned, Canada Life's senior in-house counsel, Mr. Charles H. MacPhaul, submitted a summary judgment affidavit testifying as to Canada Life's routine amendment practices in 1990 and 1991. Mr. MacPhaul's foundation for his testimony was as follows. First, he stated that he presently was senior in-house counsel for Canada Life. He never actually stated that he was employed by Canada Life in 1990 or 1991, when these purported amendments were purportedly adopted. He then stated that he was responsible for overseeing all "legal matters" of Canada Life. He never actually stated that he was records custodian or had any personal knowledge at all with regard to Canada Life's group disability policy amendment procedures. Finally, he stated that his affidavit testimony was based on his own personal knowledge, "and" on his "review of the records" of Canada Life.

This testimony gives every indication that Mr. MacPhaul was not even employed by Canada Life in 1990 or 1991; that he had no connection whatsoever with Canada Life's day-to-day administration of group disability policy amendments in 1990 or 1991; and that much of his testimony was based solely on his review of records created long before he was ever employed at Canada Life. This, of course, would make Mr. MacPhaul's testimony inadmissible, as it would lack foundation and it would be hearsay.

Mr. Ross objected to the district court on these bases. The district court either ignored the objections or overruled them by its silence. Mr. Ross renewed his objections in his principal brief to the Eighth Circuit.

Canada Life then made a factual assertion in its appellate brief for the first time ever. Canada Life stated that when Mr. MacPhaul ambiguously used the word "and" in his foundation testimony (that his testimony was based on his own personal knowledge "and" on his review of records), he meant to use the word "and" in the *conjunctive* sense of the word: that is, he meant that *all* of his affidavit assertions were based on contemporaneous personal knowledge gained in 1990 and 1991, but that he took the *extra care* to verify his many personal recollections with a thorough review of corroborating records.

Mr. Ross then supplied the Eighth Circuit with eight years of Martindale-Hubbell Law Directory listings showing that from 1989 through 1996, Mr. MacPhaul was listed as in-house counsel with an entirely different insurance company, Life Insurance Company of Georgia.

Armed with the knowledge that Mr. MacPhaul may have lacked the personal knowledge that he swore he had, the Eighth Circuit did: nothing.

We do not believe the accepted and usual course of judicial proceedings is to ignore the fact that a licensed attorney, who swore he had personal knowledge of his statements, gained by his employment with one insurance company in 1990 and 1991, was listed by an authoritative source as actually employed by an entirely different insurance company during that time. Rather, we believe the accepted and usual course of judicial proceedings under such circumstances would include the following: appointment of a special master to determine whether, in fact, Mr. MacPhaul had the personal knowledge that he swore he had; if he did not, determining what sanction would be appropriate under the circumstances; ordering

that attorney to show cause why he should not be disciplined; and the like.

But none of that mattered to the Eighth Circuit Court of Appeals. For that court, there was no obstacle too high, not even the real possibility that Mr. MacPhaul lacked the personal knowledge that he swore he had, that would prevent that court from flouting this Court's unanimous decision in *Curtiss-Wright*.

8. The Canada Business Corporation Act, not Federal Rule of Civil Procedure 56 nor 28 U.S.C. § 1746, governs admissibility of evidence before United States federal courts. The next departure from accepted and usual judicial proceedings is the Eighth Circuit's decision to allow the Canada Business Corporation Act to govern the admissibility of evidence in United States federal courts.

As part of his inherently speculative testimony regarding Canada Life's "routine practice" in adopting ERISA amendments, Mr. MacPhaul's affidavit set out certain documents that attempted to establish the authority of certain individuals to sign amendments on behalf of Canada Life. The authority of those individuals to sign amendments was attested to in a written declaration, attached to Mr. MacPhaul's affidavit, made by another employee of Canada Life, a Joan D. Bentley, who purported to be Canada Life's assistant secretary.

However, Ms. Bentley's written declaration did not constitute an affidavit for purposes of Federal Rule of Civil Procedure 56. Her declaration lacked a notarial seal, and her statements were not made "under penalty of perjury" as required by 28 U.S.C. § 1746. Mr. Ross objected to the

district court's consideration of the Bentley declaration on the basis that it did not constitute an affidavit. While the district court did not specifically address that objection, it did find that Canada Life effectively amended its policy because its "established business practice" called for "signed authorization pages in order for master policies" (*sic*; there is no predicate in the district court's attempted sentence). App. B-14.

On appeal, Canada Life appended to its brief a copy of certain provisions of the Canada Business Corporation Act. It argued in its brief that under Canadian law, the Bentley declaration would be admissible into evidence before Canadian courts; and concluded that therefore the evidence should be admissible before United States federal courts. No authority was cited for that proposition.

The Eighth Circuit again relegated this concern to the insignificance of a mere evidentiary matter and affirmed the district court's decision. App. A-14. In short, the Eighth Circuit apparently allowed the Canada Business Corporation Act to establish the admissibility of otherwise inadmissible evidence before United States courts.

9. Amendment-invalidation claimants must show "harm". The final error committed by the lower courts was imposing a requirement that amendment-invalidation plaintiffs show some additional harm beyond noncompliance with amendment provisions. App. B-11 to B-12; A-14 to A-15. This issue was fully briefed and argued in *Curtiss-Wright*, and it was correctly determined therein that any such requirement would result in a nullification of the ERISA requirement that plans contain and follow their own amendment provisions.

The district court's discussion of this issue cites a case (*Alford v. Kimberly-Clark Tissue Co.*, 14 F. Supp. 2d 1290 (S.D. Ala. 1998)) which confuses situations in which plans do not contain an amendment provision with plans that do. App. B-12. In the former situation, some circuits have required a showing of "harm" before an amendment will be invalidated.

In this sort of case, where the plan indisputably contains a very detailed and specific amendment procedure, this Court very clearly stated that the procedure must be followed, and failure to follow it alone suffices to invalidate purported plan amendments. *Curtiss-Wright* at 84.

10. Facts may be selectively stated such that undue aspersion is cast on Plaintiff. The Eighth Circuit opinion also selectively states facts in a manner that casts undue aspersion on Mr. Ross. The court states:

> "Canada Life * * * indicated that Ross had been overpaid benefits because the policy called for its benefits to be reduced by any social security disability payments he may have received, and he had failed to notify Canada Life that he was receiving dependent disability benefits. * * * Canada Life requested no refund on these overpayments * * * ." App. A-3 to A-4.

What the Eighth Circuit chose not to state is that Canada Life's allegation, that Mr. Ross failed to notify Canada Life of his dependents' Social Security benefits, is a complete and utter falsehood. Mr. Ross disclosed his dependents' Social Security benefits to Canada Life only months after they began to receive them. He did so at the

request of Canada Life, by completing an administrative form devised by Canada Life, and by then delivering that truthfully completed form to the designated recipient, his employer, Rail Car.

Moreover, Canada Life arranged for Mr. Ross' representation in his Social Security claim. In fact, Canada Life paid the fee of the organization that handled Mr. Ross' claim. That organization was in direct communication with Canada Life throughout its handling of Mr. Ross' Social Security claim. It is difficult for us to understand how Canada Life could *not* have known this information.

What the Eighth Circuit further does not mention is that Canada Life did indeed seek refunds for all overpayments. Its answer to this lawsuit included affirmative defenses seeking offset of any recovery by Mr. Ross for the overpayments that Canada Life made by its own error.

In his motion for rehearing, Mr. Ross specifically called the Eighth Circuit's attention to this matter. The Eighth Circuit decided not to change anything, preferring instead to leave in place the false impression that Mr. Ross had withheld information rather than reporting the truth, which was that Canada Life had simply blundered again in the administration of its own policy.

To summarize, not the text of ERISA; not the Federal Rules of Evidence; not the Federal Rules of Civil Procedure; not Title 28 of the *United States* Code; not accuracy regarding the nature of the claim, the necessary parties, nor the basic facts of the case; not even the prospect of summary judgment being based on possibly untruthful testimony stood in the way of the result the lower courts

sought to achieve in this case: flout, eviscerate, contort and ignore this Court's unanimous decision in *Curtiss-Wright*, in whatever way imaginable.

Ironically, the lower courts' apparent distaste for the holding in *Curtiss-Wright* is completely misguided and short-sighted. The very odd rulings that the courts actually made in this case themselves demonstrate, better than anything else possibly could, precisely why this Court's holding in *Curtiss-Wright* is exactly correct and why, once again, it should be reaffirmed. Anything less will simply invite more judicial wrangling, and more wasted judicial time and effort, of the sort that this case has already engendered.

B. Administrative Record Claim

There is another reason why these purported amendments should be declared invalid. The only evidence Canada Life provided during administrative review of Mr. Ross' claim was a copy of its policy which contained purported amended pages lacking necessary signatures. All of the remaining evidence Canada Life later proffered, and which the lower courts admitted and relied on, was provided only after suit was filed. The issue arises, should evidence be admissible in court when it is withheld at the claims-administration level, in direct violation of plan provisions, ERISA statutes, and ERISA regulations?

The law and facts on this issue generally are as follows. ERISA requires plans to provide for a full and fair review of denied claims. ERISA § 503. Part of that full and fair review includes the right of the claimant to review pertinent documents. 29 C.F.R. § 2560.503-1(g)(1)(ii). The right to review plan documents also is set out at ERISA

§§ 104(b)(2) and 104(b)(4). Canada Life was the claims administrator of this plan.

After denial of his continuing eligibility for benefits, Mr. Ross requested that Canada Life provide a copy of its policy. Canada Life provided the copy of the policy with purported amendments completely lacking signatures. Mr. Ross requested, in writing, clarification and additional documentation, and Canada Life positively asserted in writing that the policy it had already provided was the entirety of the plan documents that applied to Mr. Ross. Mr. Ross again requested, in writing, that Canada Life provide all documents comprising this plan. Canada Life did not even respond to this third request for plan documents.

Mr. Ross thereupon appealed the denial of his claim. Canada Life took no action on the appeal within sixty (60) days, whereupon Mr. Ross wrote Canada Life and advised it of its obligation under ERISA § 503 and 29 C.F.R. § 2560.503-1(h)(1)(i) to issue a final administrative ruling. After more than 120 days, Canada Life still had not issued a final administrative ruling. Rather, it simply ignored Mr. Ross, and never did issue a final written decision on administrative review, whereupon Mr. Ross initiated this lawsuit.

After suit was filed, Canada Life produced over 1,100 pages of documents for the first time. It admitted that all 1,100 pages were relevant to the issue of whether amendments existed. It also offered for the first time Mr. MacPhaul's unfounded, irrelevant, inherently speculative, and possibly untruthful affidavit testimony regarding Canada Life's routine amendment practices.

Mr. Ross objected to the district court's consideration of any and all of this evidence. The court admitted it all and in fact based its decision on both documentary and testimonial evidence that was withheld at the administrative level. App. B-10, note 3.

The Eighth Circuit generally affirmed the district court's decision, finding that "good cause" existed for expansion of the record in this case. App. A-14. Neither court identified what that "good cause" was, because there patently and palpably was no "good cause" for these failures in this case. All there was to support the courts' "good cause" findings were Canada Life's third and fourth blunders in the administration of its own policy, namely, its failure to provide documents upon two written requests and its refusal to issue a final written decision on administrative review, all in direct violation of its own policy, ERISA statutes, and ERISA regulations.

We do not believe the law should reward a party for violating its own policy provisions, ERISA statutes, and ERISA regulations requiring that documents be provided and that claims be decided. Rather, we believe under the circumstances of this case, Canada Life should be bound by the record it created on administrative review. That record consisted solely of the policy containing purported amended pages with no signatures of any sort.

C. Plan Document Request Claim

During administration of Mr. Ross' claim, Canada Life asserted that it had provided all pertinent plan documents, and it ignored a subsequent request for such documents. During litigation, it then produced, for the first time ever, over 1,100 pages of documents that it

admitted were relevant to the validity of its purported amendments. Mr. Ross therefore sought statutory damages under ERISA § 502(c)(1).

The district court found that Canada Life could not be liable for such damages because it was not named as administrator of this plan. The district court cited a line of circuit court cases holding that only the named plan administrator can be liable for damages under ERISA § 502(c)(1). App. B-16 to B-18.

The cases cited by the district court are inapposite to this case. In those cases, the claim was made that some person or entity was a "de facto" plan administrator even though they were nowhere named in the plan documents as an administrator (at least that is what the reported decisions disclose).

Mr. Ross' claim is different. Mr. Ross' claim is that these plan documents contradictorily name *two* parties, Rail Car and Canada Life, as potential administrators of Mr. Ross' plan document requests. To the extent responsibility for provision of plan documents to Mr. Ross pursuant to his requests is concerned, the evidence points straight to Canada Life as the entity responsible for providing them. The facts are as follows.

Canada Life was in complete control of claims processing of this plan and this claim. Canada Life made all initial claim denials. Canada Life had sole authority to decide appeals. Most importantly, the claims process Canada Life set forth in its own document (in this case, its own booklet certificate) specifically stated that its own claim review process guaranteed access to pertinent documents.

In addition, it is undisputed that Canada Life was in fact the sole repository of its own original policy. Any request Mr. Ross made to anyone else (e.g., to Rail Car) for original documents would have been completely unavailing.

The result reached by the district court therefore turns the contract's language, normal rules of contract interpretation, the reality of this case, and the relevant statutory language, completely upside-down. The statute (ERISA § 3(16)(A)(i)) states that the plan administrator is "the person *specifically* so designated by the terms of the instruments under which the plan is operated" (emphasis added). The district court instead ruled that a *general* designation of Rail Car as general plan administrator prevailed over the contradictory, but more specific, plan provision stating that Canada Life was responsible for providing plan documents during administration of claims.

The Eighth Circuit took a different approach on this issue. That court stated, in essence, that because Mr. Ross admits that the 1,100 withheld pages cannot establish an amendment (despite Canada Life's admission that they can), then Mr. Ross cannot recover damages for Canada Life's failure to provide the documents. App. A-16. This again turns the law, and common sense, completely on their heads.

The statutes (ERISA §§ 104(b)(2) and 104(b)(4)) provide that the administrator must disclose the latest "trust agreement, contract, or *other instruments under which the plan is established or is operated*" (emphasis added). Nowhere do the statutes state that only *legally valid* instruments under which the plan is actually being operated must be provided. Such a rule would be nonsensical.

The Eighth Circuit's decision stands for this proposition: ERISA protects a claimant's right to see only legally-valid plan documents; ERISA does not protect a claimant's right to demand to see legally invalid plan documents under which the plan is actually being operated. If the plan is actually being operated under invalid documents, ERISA encourages the plan to hide and withhold them, and to suffer no detriment for doing so. In that way, ERISA is meant to assist plans in operating illegally, with no recourse in participants under ERISA § 502(c)(1) to ascertain the illegality of plan documents or operations.

Moreover, the Eighth Circuit's position is ultimately completely self-contradictory. The Eighth Circuit also relies on the decision of the district court. App. A-14. The district court admitted some of the 1,100 pages, and the district court found that those pages in fact *did* establish a valid amendment. Thus, the Eighth Circuit's opinion is completely equivocal on the basic issue of whether the withheld documents do or do not establish amendments; and if they do not, the Eighth Circuit holds that ERISA encourages the plan to hide that fact because the plan participant has no right under ERISA § 502(c)(1) to demand to see them and ascertain their invalidity.

On this issue, the Eighth Circuit also misstates facts. The court states that Mr. Ross' counsel admitted at oral argument that he never demanded to see the original policy with the original amendments attached. App. A-14. This misstates the question that was asked, the response that was given, and other evidence in the record.

The question that was asked at oral argument, to the very best of counsel's recollection, was:

> "Did you *actually go out there* and demand to see the original?" (emphasis added).

Counsel correctly answered "no," and explained that such a trip (to Canada Life's offices in Toronto, Ontario, Canada or Atlanta, Georgia) was completely unnecessary and would have been entirely fruitless. Canada Life had already provided its policy with purported amended pages bearing *no signatures of any sort* – not original signatures, not facsimile signatures, not any signatures in any condition. Asked twice in writing to clarify its documents, Canada Life first stated it had already provided all pertinent documents, and then completely ignored Mr. Ross' final request.

In addition, Mr. Ross did in fact depose the person at Rail Car with authority in these matters. That individual verified that Rail Car did not have a document with an original signature of Canada Life's registrar or assistant registrar for these purported amendments.

Mr. Ross took every action that was necessary to establish this undisputed fact: there does not exist an amendment with an original signature of Canada Life's registrar or assistant registrar that was attached to the policy. Canada Life did not attach pages with any signatures of any sort to its policy. Its purported amendments are therefore invalid. Thus, only by misrepresenting the question that it asked, and imposing a duty on Mr. Ross' counsel to take an entirely wasteful trip that would have verified a fact that he already knew, is the Eighth Circuit able to make this erroneous allegation.

CONCLUSION

With the wages of a welder, Mr. James B. Ross purchased insurance coverage to protect himself and his family from the loss of his income in the event of his disability. The insurance contract contained a detailed and specific provision regarding how changes to that contract had to be made. This Court has unanimously held that any changes must comply with the contract's own amendment procedure. Purported changes made to the contract, which dramatically curtail Mr. Ross' benefits, do not so comply. In response, the lower courts: applied the wrong statute; ignored unanimous and controlling precedents of this Court; and allowed invented factors, inadmissible documentation, and inherently speculative testimony, based on possibly untrue foundation, to establish the validity of the amendments.

This case implicates some of the most basic and fundamental questions that a court of law could address. Such questions include: Can rules of procedure, evidence, and substantive law be made a mockery of in the pursuit to reach a result? Is ascertainment of the truth the goal of judicial endeavors any more, or has truth become a casualty of that process, to be discarded, ignored, hidden, and even misrepresented, in the name of expediency? In short, are we still a nation of *laws*?

Respectfully submitted,

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Appendix A: Opinion of the United States Court of Appeals for the Eighth Circuit Dated and Decided April 9, 2002.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No.00-2800

James B. Ross,	*	
	*	
Plaintiff-Appellant,	*	Appeal from the United
	*	States Disrict Court for
v.	*	the District of Nebraska
	*	
Rail Car America Group Disability Income Plan; The Canada Life Assurance Company,	*	
	*	
	*	
	*	
Defendants-Appellees.	*	

Submitted: March 15, 2001
Filed: Apirl 9, 2002

Before BYE and JOHN R. GIBSON, Circuit Judges, and FRANK,[1] District Judge.

JOHN R. GIBSON, Circuit Judge.

James Ross appeals from the district court's[2] entry of summary judgment in favor of Canada Life Assurance Company on his amended complaint seeking relief under

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[1] The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota, sitting by designation.

[2] The Honorable Thomas M. Shanahan, United States District Judge for the District of Nebraska.

the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1994 & Supp. V 1999). Ross had been receiving disability income benefits pursuant to a group insurance policy issued to his employer by Canada Life. When those benefits ceased, Ross brought this action against three entities: Canada Life; Rail Car America, Inc., his employer;[3] and Rail Car America Group Disability Income Plan, the employee benefit plan established to provide disability income benefits to Rail Car employees. Ross later voluntarily dismissed the action against Rail Car America, Inc., and the district court entered summary judgment in favor of the Plan and Canada Life.

Ross argues on appeal that the district court erred by determining that the Plan was twice properly amended. The first amendment shortened the duration of his benefits and the second reduced the amount of his monthly payment. Ross also argues that the district court erred in finding that Canada Life was not the Plan Administrator and therefore not liable for statutory damages for failing to provide documents that he requested. Finally, Ross objects to evidentiary and attorney's fee rulings by the district court. We affirm the judgment entered by the district court.

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[3] The district court noted that Ross was actually employed by American Hydraulics, a company that later became a subsidiary of Rail Car America, Inc. Although the record does not reveal when the corporate change occurred, it is clear that Ross was a participant in the Rail Car America Group Disability Income Plan.

I.

We review the district court's grant of summary judgment de novo, viewing the record in the light most favorable to Ross as the non-moving party. *Woo v. Deluxe Corp.*, 144 F.3d 1157, 1160 (8th Cir. 1998). Ross, who became disabled due to colon cancer while he was employed at Rail Car, began receiving benefits under the Rail Car Disability Income Plan in 1992. The Plan is an employee welfare benefit plan as defined in 29 U.S.C. § 1002(1), and it provided benefits through a Canada Life insurance policy held by Rail Car. In April 1997, Canada Life determined that Ross was no longer disabled and advised him that his benefits would cease at the end of that month. He appealed the termination decision and Canada Life agreed to continue paying benefits pending its investigation. After having no success in obtaining medical information it requested from Ross, Canada Life suspended benefits payments in December 1997. Ross then involved counsel in his efforts to resume benefits, and Canada Life once again prepared to review its decision on appeal.

During the appeal period, Canada Life advised Ross through his counsel that his benefits were being terminated for a new reason: he had exceeded the policy's maximum benefit period of sixty months. Canada Life also indicated that Ross had been overpaid benefits because the policy called for its benefits to be reduced by any Social Security disability payments he may have received, and he had failed to notify Canada Life that he was receiving dependent disability benefits. In addition, although his sixty months of benefits had been paid by May 1997, Canada Life continued to make monthly payments through December of that year. Canada Life requested no

refund on these overpayments, but once again advised Ross that he had the right to appeal its determination. His attorney challenged the process under which the Canada Life policy had been amended before Ross became disabled (resulting in the sixty-month maximum benefit period) and requested documents concerning the amendment process. Canada Life did not respond, and Ross filed this action.

At various times during this more than year-long exchange of correspondence, Ross and his attorney asked Canada Life to provide copies of Plan documents. In response, Canada Life sent a copy of the insurance policy.

The Plan, as already noted, paid disability income benefits through the Canada Life insurance policy held by Rail Car.[4] Indeed, the policy constituted the Plan's only asset. The Rail Car policy was a standard long-term group disability policy offered by Canada Life for coverage of a policyholder's employees. All full-time employees of Rail Car were eligible for coverage, with the employee paying the premium by way of a payroll deduction. Employees were first notified of the policy and its benefits through employee meetings held in 1983, when Rail Car began offering the benefits. At that time, Rail Car gave each employee a copy of the Summary Plan Description relating to the policy. Thereafter, each new employee was given a copy of the Summary Plan Description after that employee completed ninety days of continuous employment (the policy's eligibility period).

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[4] Although there is no indication that the Plan has ceased to exist, it no longer provides benefits through a policy with Canada Life.

In both 1990 and 1991, Canada Life informed Rail Car that employee premiums would be increased. Charles Franklin, a Rail Car vice president who was authorized by the company to act on its behalf as Plan Administrator, negotiated with Canada Life to change the terms of the coverage so as to avoid premium increases. In the fall of 1990, the policy was amended to reduce benefits from sixty-six percent of an employee's monthly earnings to sixty percent. In mid-1991, the policy was again amended to reduce the maximum benefit period for claimants who were under age 65 at the time they became disabled. Those benefits were originally available until the claimant reached age 65, but following the amendment, benefits were payable for a maximum of sixty months. As a result of these amendments, premiums actually decreased by five cents per $100 of a participant's income.

Franklin met individually with each Plan participant in June 1991, after both amendments were negotiated, and provided each with a personalized memorandum describing the changes and the premium formula to be effective July 1. In August 1991, Franklin received copies of a new Summary Plan Description from Canada Life that reflected the amendments. He forwarded copies to each of the Rail Car facilities for distribution to participants. Ross denies having received a personalized memorandum and does not recall receiving a copy of the revised Summary Plan Description.

Because the Rail Car America Group Disability Income Plan is an employee benefit plan as defined by 29 U.S.C. § 1002(1) and (3), it is required to be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1). The district court determined that the

policy and the Summary Plan Description jointly constitute the Plan documents.[5] The policy is a standard contract of insurance setting forth eligibility requirements, benefit payments, and similar information. It contains no mention of ERISA or its requirements. The Summary Plan Description that was in place at the time Mr. Ross applied for benefits in 1992 provided general information about the policy. ("While it does not take the place of the Group Policy and is not a contract of insurance, [this Summary Plan Description] explains the essential features of the group plan.") In addition, it provided information about the Plan, as required by ERISA, including the Plan's name, the name and address of the policyholder, identification of the type of plan and type of administration, and a statement of a participant's ERISA rights. *See* 29 U.S.C. § 1022 (Supp. V 1999) (setting forth required contents of summary plan descriptions); 29 C.F.R. § 2520.102-3 (2000) (same). The Summary Plan Description identified the Plan Administrator as Rail Car America and provided the company's address and phone number. It advised participants of their rights and protections under ERISA,

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[5] The district court's determination was correct as a matter of law. *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994) ("[Summary plan descriptions] are considered part of the ERISA plan documents."). As the Supreme Court explained in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995), one of the purposes of § 1102(a)(1)'s requirement that every employee benefit plan be established and maintained through a written document is to enable participants and beneficiaries to readily learn their rights and obligations. In this case, then, it follows that both the Summary Plan Description and the policy constitute the Plan because the former identifies the Plan Administrator and sets forth participants' ERISA rights, while the latter describes the benefits and amendment procedure.

including the right to obtain Plan documents and other Plan information from the Administrator.

The Summary Plan Description also notified participants that Canada Life was responsible for the administration of claims, including the handling and processing of claims forwarded to it by Rail Car. Canada Life was designated as the entity authorized to make the final decision on all claims. Mr. Ross does not allege, and the record contains no evidence, that Canada Life performed any functions beyond that of claims administrator.

II.

Ross argues that summary judgment should not have been entered against him on the first two counts of his amended complaint because the district court erred in its conclusion that the policy was validly amended to reduce both the amount and the duration of his benefits. Ross alleges that the policy was not properly amended according to procedures articulated in the policy itself, and that Canada Life's failure to follow the procedure should invalidate the purported amendments.

A.

We begin our discussion of this issue by analyzing the ERISA provision that authorizes this cause of action. Remarkably, this case went from complaint through judgment without any mention of what statutory provision

that might be.[6] Ross asserts in his opening brief to this court that this is a claim for benefits under 29 U.S.C. § 1132(a)(1) (section 502(a)(1) of ERISA), but it is not. Although his ultimate goal is to continue receiving disability income benefits from Canada Life, section 502(a)(1)(B) authorizes a participant to bring an action to recover benefits, enforce rights, or clarify rights to future benefits *under the terms of the plan.* Ross is not seeking to obtain benefits under the terms of the Plan. Rather, he is seeking to reform the Plan by obtaining a declaration that the purported 1990 and 1991 amendments are void. Section 502(a)(1)(B) does not authorize such a claim. *See O'Brien v. Sperry Univac,* 458 F.Supp. 1179, 1180 (D.D.C. 1978) (holding that suit seeking to have portion of "plan declared void because the summary plan description appears to alter the terms of the original plan . . . is not a claim under the 'terms of the plan'"); *Guthrie v. Dow Chem. Co.,* 445 F.Supp. 311, 314-15 (S.D. Tex. 1978) (holding that plaintiffs who seek to have a portion of plan declared illegal for constitutional and ERISA violations do not state claim under section 502(a)(1)(B)); *but see Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local No. 111 v. Douglas,* 646 F.2d 1211, 1214 (7th Cir. 1981) (holding that

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[6] The pre-trial order recites the contested issues in the case, including "[w]hether Canada Life can be held liable for any purported breach by Rail Car as a co-fiduciary." This issue is foreclosed by *Lockheed Corp. v. Spink,* 517 U.S. 882, 889-90 (1996), where the Supreme Court held that a plan sponsor does not act as a fiduciary when it amends a plan. *See also Voyk v. Bhd. of Locomotive Eng'rs,* 198 F.3d 599, 605 (6th Cir.1999); *Walling v. Brady,* 125 F.3d 114, 117-18 (3d Cir.1997). Accordingly, if Rail Car was not acting as a fiduciary, Canada Life cannot be held liable as a co-fiduciary.

union may bring section 502(a)(1)(B) claim against trustees of multi-employer trust fund for alleged violations of ERISA and Labor Management Relations Act in amending eligibility rules for welfare benefits, because the action seeks to clarify members' rights to future benefits if union would withdraw from plan).

Ross's choice of defendants provides another indication that this is not a section 502(a)(1)(B) claim. Although he named the Plan, Rail Car, and Canada Life as defendants, he later voluntarily dismissed Rail Car as a party defendant. It appears as though the Plan was never more than a nominal party in the district court proceedings. In its ruling on Ross's and Canada Life's cross motions for summary judgment, the district court stated:

> Through an apparent abundance of caution, Ross named Rail Car America Group Disability Income Plan as a defendant to this action. However, because both Rail Car (the plaintiff's employer and Plan administrator) and Canada Life (the Plan's claims administrator) are no longer defendants to this action, the court will dismiss any remaining allegations against Rail Car America Group Disability Income Plan as moot.

The Plan did not file a brief on appeal because, as counsel wrote in a letter to the Clerk of Court, "the Plan was merely a nominal defendant in the lower court action and is likewise a nominal appellee." . . .

The employee benefit plan itself is ordinarily liable for benefits payable under the terms of the plan and is thus the primary defendant in a section 502(a)(1)(B) action. *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1490 (7th Cir. 1996) ("The appropriate defendant for a denial of benefits claim would be the Plan. . . ."); *Gelardi v.*

Pertec Computer Corp., 761 F.2d 1323, 1324 (9th Cir. 1985); *see also* 29 U.S.C. § 1132(d)(2) ("Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter."); *cf. Everhart v. Allmerica Fin. Life Ins. Co.*, 275 F.3d 751, 754 (9th Cir. 2001) (recognizing line of cases allowing a claimant to bring an action to recover benefits against a plan administrator, but finding no authority for such a claim to be brought against the plan's insurer) (citing cases).

The two counts which seek to invalidate the amendments can only be characterized as arising under 29 U.S.C. § 1132(a)(3), section 502(a)(3) of ERISA. It is this provision which authorizes a participant to bring an action to enjoin any act which violates either a provision of ERISA Title I (Protection of Employee Benefit Rights, 29 U.S.C. §§ 1001-1191c) or the terms of the plan, or to obtain other appropriate equitable relief to enforce any provisions of Title I or the terms of the plan. Ross argues that Canada Life's ability to amend the policy is circumscribed by the amendment procedure set forth in the policy itself pursuant to 29 U.S.C. § 1102(b)(3) (section 402(b)(3) of ERISA), and that Canada Life violated the prescribed procedure when it failed to attach signed amendments to the policy and failed to obtain Rail Car's signature on the amendments. Although he ultimately seeks a restoration of full benefits, the vehicle for that requested relief is invalidation of the amendments. As such, Ross seeks

equitable relief to enforce a provision of Title I, namely section 402(b)(3) of ERISA.[7]

B.

The district court determined that the Plan was amended in conformity with the policy's provisions and that the amendments were therefore valid, citing section 402(b)(3) of ERISA and the seminal case of *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78 (1995). We review the district court's interpretation of ERISA under a de novo standard. *Wetzel v. Lou Ehlers Cadillac Group Long Term Disability Ins. Program,* 222 F.3d 643, 646 (9th Cir. 2000) (en banc).

Ross does not dispute that the Rail Car Plan was susceptible to amendment. As the Supreme Court laid out in *Curtiss-Wright,* a section 402(b)(3) analysis of the validity of an amendment requires two things: the plan must set forth *who* is authorized to amend the plan and *how* amendments are to be effectuated. 514 U.S. at 78-80. The parties and the district court addressed the issue as

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[7] In making this statement, we are mindful of the Supreme Court's narrow reading of equitable relief available under 29 U.S.C. § 1132(a)(3), most recently repeated in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, ___, 122 S.Ct. 708, 712 (2002) (explaining that "equitable relief" as used in § 1132(a)(3) means something less than all relief, instead referring to categories of relief typically available in equity). In order to obtain complete relief, a successful plaintiff may need to assert claims against both a plan and its sponsor and/or administrator and/or issuer of an insurance policy that provides benefits under the plan, asserting claims under §§ 1132(a)(1)(B) and (a)(3).

though Canada Life had the authority to amend it. However, that authority resided with Rail Car.

As the Summary Plan Description made clear, Rail Car America was the Plan's sponsor: it was the policyholder and it established this disability income plan for its employees. *See* 29 U.S.C. § 1002(16)(B) ("The term 'plan sponsor' means . . . the employer in the case of an employee benefit plan established or maintained by a single employer. . . ."). As such, Rail Car had the unilateral right to amend the policy that provided insurance under the Plan. "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright,* 514 U.S. at 78; *accord Ravenscraft v. Hy-Vee Employee Benefit Plan & Trust,* 85 F.3d 398, 401 (8th Cir. 1996). Thus, the answer to the "who" question was Rail Car and not Canada Life.

Determining "how" the plan can be amended is shorthand for satisfying section 402(b)(3)'s requirement that a plan have "a procedure for identifying the persons who have authority to amend the plan." *Curtiss-Wright,* 514 U.S. at 78. Here, the policy answers the "how" question by pointing to a particular way in which the amendment process is carried out. The change must: 1) be in writing; 2) be attached to the policy; 3) bear the original or reproduced signatures of Canada Life's president, chief actuary, or secretary; and 4) bear the signature of its registrar or assistant registrar.[8]

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[8] The policy does not require Rail Car's signature on amendments, contrary to Ross's assertion.

Ross devotes a substantial part of his brief to arguing that the amendments are void under section 402(b)(3) because Canada Life cannot prove that it followed this designated procedure. Specifically, he finds fault with the district court's conclusion that the amendments were attached to the policy and bore the requisite signatures. Under Ross's theory, the 1990 and 1991 amendments were void because Canada Life did not produce original amendment pages (with original signatures by one of the listed Canada Life officers and its registrar or assistant registrar) attached to the original policy. Ross grounds his theory on ERISA's goal of enabling employees to determine their rights and obligations under a plan by examining the plan documents. We are not persuaded that the district court erred.

First, Ross urges a statutory goal that the Supreme Court has rejected under section 402(b)(3). In *Curtiss-Wright,* plaintiffs argued that section 402(b)(3) was enacted to ensure that every plan has an amendment procedure and to enable participants and beneficiaries to examine a single plan document for the purpose of ascertaining their rights and obligations. 514 U.S. at 83. The Court agreed as to the first purpose but disagreed as to the second, whose statutory sanctuary it declared to be section 402(a)(1) ("Every employee benefit plan shall provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter. . . ."). The Court described the goal of section 402(b)(3) as ensuring that each plan is amendable, giving such amendments their due, and making amendments stand out and be distinguishable from other communications. 514 U.S. at 82.

The undisputed facts confirm that the copy of the policy Canada Life sent to Ross easily satisfied the goals of section 402(b)(3). The amendments were incorporated in the policy and were restated in their entirety so as to delete the superceded provisions. The document was consecutively paginated and each page listed an effective date. In sum, the amended policy was clear and concise. We fail to see how a document fashioned in the manner Ross suggests would achieve these goals. His counsel conceded at oral argument that he had never requested to see the original policy with the amendments attached, nor did he dispute the reliability of the copy he received.

In reality, the essence of Ross's entire claim in counts one and two is an evidentiary one. He objects to the district court's conclusions as to the admissibility of affidavits concerning Canada Life's procedures and he challenges the foundation laid for the authenticity of documents. We are well satisfied that the district court did not abuse its discretion with respect to these evidentiary issues. He also objects to the district court's consideration of evidence outside of the administrative record, but the limitation he urges does not apply in a de novo review of the district court's interpretation of ERISA. *Cf. Donatelli v. Home Ins. Co.*, 992 F.2d 763, 765 (8th Cir. 1993) (in case involving review of fiduciary's denial of benefits, district court may allow introduction of evidence outside the administrative record if standard of review is de novo).

We affirm the entry of summary judgment on counts one and two of Ross's amended complaint because the 1990 and 1991 amendments were validly enacted. Because of our decision, we do not reach the issue of the district court's alternative holding that even an improper amendment would be valid because Ross introduced no evidence

of bad faith, active concealment, or detrimental reliance that would justify the relief he seeks.

III.

Ross asserts that the district court erred by entering summary judgment in favor of Canada Life on counts three and four of his amended complaint, in which he seeks relief under 29 U.S.C. § 1132(c) (section 502(c) of ERISA) for Canada Life's alleged failure to provide him with Plan documents upon written request.[9] Ross twice asked Canada Life to provide documents on which it was relying to support the validity of the 1990 and 1991 amendments, and in reply he was sent a copy of the insurance policy. He did not receive any change forms reflecting the amendments in response to these requests, but after he filed suit Canada Life produced more than 1,000 pages of documents that it had not provided earlier, including a change form for each amendment.

Section 502(c) of ERISA allows the district court to impose a discretionary $100 per day fine on a plan administrator who fails to provide copies of certain plan documents to participants and beneficiaries. The district court entered summary judgment on counts three and four because it determined that Canada Life is not the Plan Administrator. Ross argues that this is in error because the Summary Plan Description is inherently ambiguous as to the identity of the Administrator, and because Canada

[9] Section 502(a)(1)(A) of ERISA authorizes a cause of action for the relief requested in section 502(c). Specific mention of this claim was included in the pre-trial order.

Life served as claims administrator and was the repository of the Plan documents and thus should be held to be the de facto Plan Administrator.

Ross's arguments cannot stand in the face of the uncontroverted facts, ERISA, and settled case law. The Summary Plan Description unambiguously identifies Rail Car as the Plan Administrator. Canada Life admits that it had control over claims under the policy, but assuming that function did not transform it into the Plan Administrator. ERISA specifically makes the Plan Administrator responsible for providing the Plan documents Ross requested, *see* 29 U.S.C. § 1024(b), and the Summary Plan Description directed that all requests for Plan documents be made in writing to the Plan Administrator.

In his effort to gain a reversal, Ross sets forth diametrically opposing arguments. He first says that Canada Life should have provided him with all of the Plan documents he requested because we should hold that Canada Life was the Plan Administrator. He then says that Canada Life should not have sent the documents that it did send because that left Ross with the impression that it was the Plan Administrator. These arguments are hardly consistent, comprehensible, or persuasive. We affirm the district court's entry of summary judgment on counts three and four of the amended complaint.

IV.

We have considered Ross's other arguments and find them to be without merit. Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

Appendix B: Memorandum and Order of the United States District Court for the District of Nebraska Dated and Filed June 15, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JAMES B. ROSS, Plaintiff, vs. RAIL CAR AMERICA GROUP DISABILITY INCOME PLAN and THE CANADA LIFE ASSURANCE COMPANY, Defendants.	)	8:99CV191 MEMORANDUM AND ORDER (Filed June 15, 2000)

Before the court are: (1) filing no. 49, the "Plaintiff's First Motion for Summary Judgment and Request for Oral Argument," filed by the plaintiff, James B. Ross; (2) filing no. 93, the "Motion of Defendant Canada Life for Summary Judgment and Request for Oral Argument," filed by the defendant, The Canada Life Assurance Company; and (3) filing no. 100, the "Plaintiff's Motion in Limine and Motion to Strike," filed by the plaintiff, James B. Ross. In his Motion (filing no. 49), the plaintiff seeks summary judgment on Count I of his Amended Complaint (filing no. 38) as well as on the affirmative defenses raised by defendant-Canada Life. In its Motion (filing no. 93), defendant-Canada Life seeks summary judgment on all counts of the plaintiff's Amended Complaint (filing no. 38). The parties have submitted briefs and evidence for the court's consideration in compliance with N.E.L.R. 7.1(a) and (b) and 56.1(a) and (b). Because oral argument is unnecessary for the court's resolution of the pending summary judgment

motions, the parties' requests for oral argument on said motions is denied. *See* NELR 7.1(e) (stating that oral argument on any motion shall be held only upon order of the court).

BACKGROUND

The plaintiff, James B. Ross ("Ross"), was employed by Rail Car America, Inc.[1] ("Rail Car") from May 1988 until June 1992. (filing no. 50 Ex. 1 ¶¶ 3-4) While employed by Rail Car, Ross participated in a group disability plan maintained by Rail Car and known as the Rail Car America Group Disability Income Plan (the "Plan"). (filing no. 50 Ex. 1 ¶ 5) Ross was thus a participant in an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The Plan's sole asset was an insurance policy labeled "Group Disability Income Policy, No. H.41596" (the "Policy"). (filing no. 94 Ex. 4 ¶ 5) The Policy, issued by The Canada Life Assurance Company ("Canada Life"), identified Rail Car as the policy holder. (filing no. 94 Ex. 1 attach. A at 1)

The Policy issued by Canada Life was a standard long-term group disability policy offered by Canada Life at the time. (filing no. 94 Ex. 3 ¶ 5) In accordance with the

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[1] Actually, Ross was employed by a company then known as American Hydraulics, a now-merged subsidiary of Rail Car America, Inc. However, for the sake of clarity, the court will refer to Ross' employer throughout this Memorandum and Order as either "Rail Car America, Inc." or "Rail Car."

terms of the Policy, Canada Life produced "Booklet-Certificates" for Rail Car to distribute to the Plan participants. (filing no. 94 Ex. 3 ¶¶ 6, 7) These "Booklet-Certificates" were provided to the Plan participants to "outline the essential provisions of the policy." (filing no. 94 Ex. 1 attach. A at 13) Specifically, each Booklet-Certificate, or Summary Plan Description ("SPD"), contained a description of the terms and conditions of the Plan, explained the procedures for presenting a claim, and disclosed the rights afforded to participants in the Plan under ERISA. (filing no. 94 Ex. 1 attach. B) The SPD designated Rail Car as the sole Plan Administrator. (filing no. 94 Ex. 1 attach. B at 2) Together, the SPD and the Policy constituted the Plan's formal written documents.[2]

In 1990 and 1991, Rail Car sought to amend the Policy to offset premium increases. (filing no. 94 Ex. 4 ¶ 7a-d) The 1990 amendment was intended to reduce the

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[2] ERISA states that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(1). In this case, the parties disagree regarding what documents actually constitute the Plan. Ross asserts that the Plan consists solely of the Policy, whereas Canada Life argues that the Plan consists of both the Policy and the SPD. While, ERISA requires that the Plan be established and maintained by a "written instrument," no additional formalities are required. "In particular, there is no requirement that documents claimed to collectively form the employee benefit plan be formally labeled as such." *Horn v. Verdon, Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 127 (9th Cir. 1991). In addition, there is no requirement that the written instrument be one all-inclusive document. *See Eardman v. Bethlehem Steel Corp. Employee Welfare Benefit Plans*, 607 F.Supp. 196, 207 (W.D.N.Y. 1984); *Myron v. Trust Co. Bank Long Term Disability Benefit Plan*, 522 F.Supp. 511 (N.D.Ga. 1981). Accordingly, the court concludes that the Policy and the SPD, together, constitute the Plan.

amount of insurance benefits from 66% of monthly earnings to 60% of monthly earnings. (filing no. 94 Ex. 4 ¶ 7b) The 1991 amendment was intended to reduce the maximum benefit period to a period of 60 months for claimants who were less than 65 on the date disability commenced. (filing no. 94 Ex. 4 ¶ 7d) In 1992, Ross applied for, and began receiving, total disability benefits under the Plan. (filing no. 50 Ex. 5)

In 1997, Canada Life ceased paying benefits to Ross due to his failure to provide Canada Life with "medical documentation which supports total disability and which reflects that [Ross is] under the continuing care of a physician . . . . " (filing no. 50 Ex. 8 at 61) In appealing Canada Life's adverse determination, Ross was informed that Canada Life would not rely on Ross' physical condition in upholding the denial of benefits. Rather, Canada Life informed Ross that his denial of benefits would be upheld based on the Policy provision establishing a 60-month limitation on total-disability benefits allegedly made a part of the Policy in 1991. (filing no. 50 Ex. 14 at 108-09) Following further correspondence between Ross and Canada Life, Ross filed this ERISA action seeking, among other things, an "order requiring the Defendants to make an immediate distribution of all monthly disability benefits which have accrued since they were discontinued," as well as "an order reinstating Mr. Ross to all future benefits to which he is entitled under the plan without regard to the purported [1991] amendment . . . . ": (filing no. 1 at 8)

SUMMARY JUDGMENT STANDARD

Pursuant to Fed. R. Civ. P. 56, summary judgment is appropriate when, viewing the facts and inferences in the light most favorable to the nonmoving party, "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Harder v. Acands*, 179 F.3d 609, 612 (8th Cir. 1999). "In making this determination, the function of the court is not to weigh evidence and make credibility determinations, or to attempt to determine the truth of the matter, but is, rather, solely, to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *see Hedges v. Poletis*, 177 F.3d 1071, 1074 (8th Cir. 1999). The court must "look to the substantive law to determine whether an element is essential to a case, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Dulany v. Carhahan*, 132 F.3d 1234, 1237 (8th Cir. 1998) (quoting *Anderson*, 477 U.S. at 248). One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses and the rule should be interpreted in a way that allows it to accomplish this purpose. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Tenbarge v. Ames Taping Tool Systems, Inc.*, 128 F.3d 656, 657 (8th Cir. 1997); *see Celotex*, 477 U.S. at 325 (the

movant must show "that there is an absence of evidence to support the nonmoving party's case."). Accordingly, a party moving for summary judgment must "set forth in the brief in support of the motion for summary judgment a separate statement of each material fact as to which the moving party contends there is no genuine issue to be tried and as to each shall identify the specific document or portion thereof or discovery response or deposition testimony (by page and line) which it claims established the fact." NELR 56.1(a).

In the face of a properly supported motion, "[t]he burden then shifts to the nonmoving party to 'set forth specific facts showing that there is a genuine issue for trial.'" *Prudential Ins. Co. v. Hinkel*, 121 F.3d 364, 366 (8th Cir. 1997) (quoting Fed. R. Civ. P. 56(e)). A nonmoving party may not rest upon the mere allegations or denials of its pleadings, but rather, must set forth specific facts, supported by affidavits or other proper evidence, showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Liberty Mut. Ins. Co. v. FAG Bearings Corp.*, 153 F.3d 919, 922 (8th Cir. 1998). In this respect, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts; [it] must show there is sufficient evidence to support a jury verdict in [its] favor." *Chism v. W.R. Grace & Co.*, 158 F.3d 988, 990 (8th Cir. 1998); *see Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997) ("The mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact."). Accordingly, the nonmoving party must "set forth in its opposing brief a separate statement of each material fact as to which it is contended there exists a genuine issue to be tried and as to each shall

identify the specific document or discovery response or deposition testimony (by page and line) which it is claimed establishes the issue." NELR 56.1(b).

ANALYSIS

Standard of Review.

Both Ross and Canada Life agree that the court should employ a de novo standard of review in addressing the questions of law presented in their respective motions, specifically: "(1) Canada Life's purported status as an administrator; (2) whether Canada Life was a fiduciary for purposes of giving notice to Plan participants; (3) whether Canada Life can be liable as a co-fiduciary for any purported act or omission by Rail Car; and (4) whether the Policy was amended . . . . " (filing no. 112)

Count I of the Plaintiff's Amended Complaint (filing no. 38)

Ross and Canada Life have filed cross-motions for summary judgment on Count I (labeled "Nonexistence or Invalidity of 60-Month Purported Amendment") of Ross' Amended Complaint (filing no. 38). While Ross asserts that he should be granted summary judgement on Count I because the Policy was not properly amended in 1991, Canada Life contends that it should be granted summary judgment because the 1991 Policy amendment is valid. Summary judgment is particularly appropriate in instances, such as this, where material facts are undisputed. Moreover, by filing cross-motions for summary judgment, the parties seemingly concede and agree that the unresolved issues in Count I are issues of law rather than issues of fact.

As the Supreme Court has made clear, "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits," and employers are "generally free . . . , for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). The Second Circuit Court of Appeals has explained the reason for this rule as follows:

> With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables . . . . [M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988); *see also Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) (noting that giving employers the ability to amend an ERISA welfare plan "encourages them to give more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour.").

However, this does not mean that welfare benefits plans are not subject to ERISA regulation. Welfare benefit plans regulated by ERISA must be "established and maintained pursuant to a written instrument;" therefore, any change or modification to a welfare plan must be in writing. *See*, 29 U.S.C. § 1102(a)(1). In addition, ERISA

requires that plan administrators furnish participants with a summary of any material modifications written in a manner calculated to be understood by the average plan participant. *See*, 29 U.S.C. § 1022(a). ERISA also requires that welfare benefits plans specify a procedure for amending the plan. *See* 29 U.S.C. § 1102(b)(3).

The policy in this case specified the following amendment procedure:

> Only [Canada Life's] President, Secretary or Chief Actuary may modify this policy or waive any of [Canada Life's] rights or requirements.
>
> Any change in the policy must be in writing and be attached to it. The change must bear the signature or a reproduction of the signature of one or more of the above officers. It must also bear the signature of [Canada Life's] Registrar or one of [Canada Life's] Assistant Registrars.

(filing no. 50 Ex. 10 at 78) The parties disagree regarding what the above-quoted language actually requires. Ross asserts that each page amended in the Policy must bear the signature of Canada Life's President, Secretary, or Chief Actuary, as well as the signature of Canada Life's Registrar or one of Canada Life's Assistant Registrars. Canada Life, on the other hand, suggests that the amendment provision requires only that the required signatures be contained on a form, describing and authorizing the amendment appended to the Policy. In examining the language of the Policy, the court finds and concludes that the amendment provision requires only that any amendment to the Policy be evidenced by a written form that: 1) describes the amendment; 2) bears the required signatures, and 3) is appended, or attached, to the Policy. According, the court further finds and

concludes that Canada Life amended the Policy in 1991 in conformity with the Policy's amendment provision.

The evidence[3] submitted with the parties' summary judgment motions demonstrates that there is no genuine issue of material fact regarding whether the Policy was properly amended in 1991. In May 1991, Rail Car entered into discussions with Canada Life regarding reducing Plan benefits in order to offset increases in the Policy's premiums. (filing no. 94 Ex. 1 ¶ 11; Ex. 3 ¶ 17) Upon Rail Car's request, Canada Life furnished Rail Car with information on three alternative coverage proposals and their respective premiums. (filing no. 94 Ex. 1 ¶ 12; attach. C) Rail Car subsequently informed Canada Life of its decision to adopt the alternative plan design that would impose a 60-month limitation on total-disability benefits under the Plan. (filing no. 94 Ex. 1 ¶ 13; attach. C) Accordingly, Canada Life amended the Policy at the direction and consent of Rail Car, the amendment's effective date being June 1, 1991. (filing no. 94 Ex. 1 ¶ 15; attach. C)

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[3] Ross asserts that certain evidence submitted by Canada Life is "irrelevant" because it is "outside the administrative record." (Pl.'s Br. in Oppo. to Canada Life's Mot. for Summ. J. at 3-6) Generally, a court considering a claim for a denial of benefits in an ERISA controlled benefit plan is limited to reviewing the evidence that was before the plan administrator when the decision to deny benefits was made. However, in Counts I and II of the Amended Complaint the court is not reviewing the propriety of Canada Life's decision to terminate Ross' benefits, but, rather, determining de novo the pure legal question whether the Policy was validly amended in 1990 and 1991. Regardless, finding good cause to do so, the court shall receive evidence outside the administrative record for the purpose of conducting a complete and adequate de novo determination of the validity of the Policy's 1990 and 1991 amendments.

In amending the Policy, Canada Life complied with the amendment provision specified in the Policy. The 1991 amendment was expressed in written form and bore the signatures of Canada Life's Secretary, Donald I. Fraser, and Assistant Registrar, Judy Tyler. (filing no. 94 Ex. 1 ¶¶ 19-21; attach. E) Pages containing the amended Policy language approved by Rail Car and Canada life were substituted and incorporated into the Policy. The amendment form was also appended to the Policy, as evidenced by a copy of the executed 1991 policy amendment (filing no. 94 Ex. 4 ¶ 7f; attach. C) and the established business practice of Canada Life regarding the attachment of amendments and signed authorization pages in order for master policies (filing no. 94 Ex. 3 ¶ 24).[4] Therefore, because Canada Life amended the Policy in 1991 in conformity with the Policy's amendment provision, the 1991 amendment is valid.

However, even if Canada Life had not amended the Policy in 1991 in the manner specified in the Policy's amendment provision, the amendment would still be valid because there is no evidence of bad faith, active concealment, or detrimental reliance that would justify granting Ross a substantive remedy for any technical violation of the Policy's amendment provision.

> Although one court has found that failure to comply with ERISA's procedural requirements in

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[4] Canada Life "has been unable to locate the original Master Policy maintained by Canada Life during the period the Policy was in effect," "[d]espite diligent searches of the records and archives maintained by Canada Life." (filing no. 94 Ex. 3 ¶ 25)

> amending a plan renders that amendment ineffective, a larger number of courts, including the Eleventh Circuit, have rejected the application of an all-or-nothing remedy in favor of an approach that "serves the dual purpose of protecting the rights of beneficiaries in the plan while allowing flexibility to the plans to grow or diminish at any time, as allowed by law." *Whitfield v. Torch Operating Co.*, 935 F.Supp. 822, 831 (E.D. La. 1996). . . . Accordingly, the court rejects the application of a par se invalidation rule in this case. Instead, the court finds under the more balanced approach that, regardless of [the defendant's] failure to follow plan procedures in this case, the plan termination at issue must be considered valid absent a showing of active concealment, detrimental reliance, or bad faith.

Alford v. Kimberly-Clark Tissue Co., 14 F.Supp.2d 1290, 1299 (S.D. Ala. 1998) (granting the defendant's motion for partial summary judgment, although the defendant failed to follow its plan procedures in terminating the plan, since the evidence failed "to demonstrate active concealment, bad faith, or detrimental reliance . . . . "). Furthermore, Ross was not prejudiced in any manner by Canada Life's decision to attach the required signatures on a special amendment form appended to the Policy, rather than affix the required signatures on each individual page amended in the Policy.

It is generally established that technical violations of ERISA's procedural requirements do not justify relief, unless such violations serve to defeat an employee's legitimate expectation of benefits. *See Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995). In this case, the court finds that the Plan participants were readily able to determine their rights and obligations by a

simple review of the unambiguous Plan documents. In addition, ERISA has a comprehensive set of "reporting and disclosure" requirements, 29 U.S.C. §§ 1021-1031, that serve to give notice to plan participants regarding amendments to ERISA plans. Specifically, 29 U.S.C. § 1024(b)(1) requires plan administrators to furnish beneficiaries with summaries of new amendments no later than 210 days after the end of the plan year in which the amendment is adopted. In August 1991, Canada Life sent Rail Car updated copies of the SPD, reflecting the 1991 amendment, for Rail Car to distribute to the Plan participants. (filing no. 94 Ex. 1 ¶ 22; Ex. 4 ¶ 7g) Thus, in regards to advising Ross of his rights and obligations under the amended Policy, Canada Life did all that was required under ERISA and the terms of the Policy.

Accordingly, because there is no genuine issue as to any material fact in Count I of Ross' Amended Complaint (filing no. 38), Canada Life is entitled to judgment as a matter of law on Count I.

Count of the Plaintiff's Amended Complaint (filing no. 38)

Canada Life requests summary judgment on Count II (labeled "Nonexistence or Invalidity of 60% Purported Amendment") of Ross' Amended Complaint (filing no. 38). Canada Life contends that summary judgment is appropriate on Count II because the 1990 Policy amendment is valid. Ross, of course, argues that the 1990 amendment is invalid for the same reasons that he argued the 1991 amendment is invalid. Based on the reasoning utilized and conclusions reached by the court in its disposition of Count I, the court finds that the 1990 amendment to the Policy is

valid and that there is no genuine issue of material fact precluding granting summary judgment to Canada Life on Count II of Ross' Amended Complaint (filing no. 38).

In the fall of 1990, Rail Car negotiated with Canada Life regarding reducing Plan benefits in order to offset increases in the Policy's premiums. (filing no. 94 Ex. 4 ¶ 7b) Canada Life amended the Policy at the direction and consent of Rail Car and thereby reduced the amount of insurance benefits payable to Plan beneficiaries, that is, a reduction from 66% of monthly earnings to 60% of monthly earnings. (filing no. 94 Ex. 4 ¶ 7b) In amending the Policy, Canada Life complied with the amendment provision specified in the Policy. The amendment was expressed in written form and bore the signatures of Canada Life's Secretary, Donald I. Fraser, and Assistant Registrar, Judy Tyler. (filing no. 94 Ex. 4; attach. A) Pages containing the amended Policy language approved by Rail Car and Canada Life were accordingly substituted and incorporated into the Policy. The amendment form was also appended to the Policy, as evidenced by a copy of the executed 1990 policy amendment (filing no. 94 Ex. 4 ¶ 7c; attach. A) and pursuant to the established business practice of Canada Life regarding the attachment of amendments and signed authorization pages to master policies (filing no. 94 Ex. 3 ¶ 24).

Therefore, because Canada Life amended the Policy in 1990 in conformity with the Policy's amendment provision, the 1990 amendment is valid. However, even if Canada Life had not amended the Policy in 1990 in the manner specified in the Policy's amendment provision, the amendment would still be valid, because there is no evidence of bad faith, active concealment, or detrimental reliance that would justify granting Ross a substantive

remedy for any technical violation of the Policy's amendment provision. Accordingly, because there is no genuine issue as to any material fact in Count II of Ross' Amended Complaint (filing no. 38), Canada Life is entitled to judgment as a matter of law on Count II.

Counts III and IV of the Plaintiff's Amended Complaint (filing no. 38)

Canada Life requests summary judgment on Count III (labeled "Failure to Provide Plan Documents Upon Lawful Request – Canada Life, First Request") and Count IV (labeled "Failure to Provide Plan Documents Upon Lawful Request – Canada Life, Second Request") of Ross' Amended Complaint (filing no. 38). Canada Life contends that summary judgment should be granted on Counts III and IV, because Canada Life was not the designated Plan administrator, and, therefore, was not required by ERISA to provide Plan documents to Ross upon his request. Ross, on the other hand, asserts that Canada Life was the sole claims administrator, a fiduciary, and a de facto co-plan administrator, and was, therefore, responsible for providing the Plan documents to Ross upon his request.

ERISA allocates to the plan administrator the sole responsibility for providing notice to plan participants of plan provisions and changes affecting plan benefits. The plan administrator must provide a detailed summary plan description to all participants, as well as notification of any material modifications that are made to a plan. *See* 29 U.S.C. §§ 1022, 1024(b)(1). ERISA provides that if a plan administrator is not designated in the written plan documents, then the plan sponsor is the plan administrator. *See* 29 U.S.C. § 1002(16)(A). The statute further indicates

that the plan sponsor is "the employer in the case of an employee benefit plan established or maintained by a single employer." 29 U.S.C. § 1002(16)(B)(i).

The written plan documents in this case designated Ross' employer, Rail Car, as the sole plan administrator. (filing no. 94 Ex. B at 3) As the plan administrator, Rail Car was the sole entity required to furnish certain information to plan participants, either automatically or upon written request of the participant or beneficiary. *See* 29 U.S.C. §§ 1024, 1025. While Ross urges the court to hold Canada Life liable under 29 U.S.C. § 1132(c)(1)(b) as a de facto co-plan administrator, the court declines to expand upon the remedies provided by ERISA. The United States Supreme Court has stated: "We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). The Supreme Court further stated that when "a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)).

The language found in 29 U.S.C. § 1132(c) is not ambiguous concerning a plan administrator's liability for failure or refusal to provide required information to a plan participant or beneficiary. *See Harris Trust and Sav. Bank v. Saloman Smith Barney, Inc.*, No. 99-579, 2000 WL 742912, *9 (U.S. June 12, 2000) ("In ERISA cases, "[a]s in any case of statutory construction, [the court's] analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well."). Simply because Canada Life was the Plan's claims administrator, "does not give this court license to ignore the statute's definition of plan administrator," as

well as the Plan's express designation of Rail Car as the plan administrator, so as "to impose on [Canada Life] the plan administrator's notification duties." *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 62 (4th Cir. 1992). Accordingly, Canada Life cannot be held liable under section 1132(c) since Canada Life is not the designated Plan administrator. *See Id.*; *Vanderlok v. Provident Life & Accident Ins. Co.*, 956 F.2d 610, 618 (6th Cir. 1992) ("Only a plan administrator can be held liable under section 1132(c), and defendant was not the plan administrator."); *Anweiler v. American Elec. Power Serv. Corp.*, 3 F.3d 986, 994 n.5 ("The district court correctly concluded that Aetna was not an administrator of the plan and not liable for penalties under 29 U.S.C. § 1132(c)."); *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 298-300 (9th Cir. 1989) ("We believe that the rationale and policies articulated by the court in [*Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)] require us to limit liability under 1132(c) to the targets expressly identified by Congress in section 1002(16)."); *McKinsey v. Sentry Ins.*, 986 F.2d 401, 403-05 (10th Cir. 1993) ("[W]e agree with the district court that Sentry was not the plan administrator and, therefore, cannot be held liable under § 1132(c) .... "); *Davis v. Liberty Mut. Ins. Co.*, 871 F.2d 1134, 1138 (D.C.Cir.1989) ("[I]t is manifest that Liberty Mutual cannot be the target of [a claim under section 1132(c)] because, as the insurer, it is not the plan 'administrator' within the meaning of ERISA.").[5]

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[5] For the same reason, Canada Life cannot be held liable under section 1132(c) even if it was a Plan fiduciary. *See Moran*, 872 F.2d at 299 n.1 ("[I]nvocation of estoppel in this case would do violence to the

(Continued on following page)

The court, therefore, concludes that Canada Life is not and was not the designated plan administrator and, consequently, could not have breached the plan administrator's statutory duties. Accordingly, because there is no genuine issue as to any material fact in Counts III and IV of Ross' Amended Complaint (filing no. 38), Canada Life is entitled to a judgment as a matter of law on Count III and Count IV.

Count V of the Plaintiff's Amended Complaint (filing no. 38)

In Count V (labeled "Failure to Provide Documents Upon Lawful Request – Rail Car") of Ross' Amended Complaint, Ross alleges that he is entitled to damages from Rail Car due to Rail Car's failure to provide Ross with Plan documents upon his written request. (filing no. 38) However, in its "Order of Dismissal" (filing no. 109), the court dismissed Rail Car as a defendant in this action upon Ross' and Rail Car's "Stipulation for Dismissal" (filing no. 108). Accordingly, as Count V relates only to defendant – Rail Car, and Rail Car is no longer a party to this action, Count V of Ross' Amended Complaint is, therefore, dismissed.

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statute by subjecting a fiduciary to sanctions applicable to a plan administrator for not performing certain functions, i.e., failure to provide plan documents upon request.")'; *Davis*, 871 F.2d at 1138 n.5 (refusing to hold an insurance company liable in its fiduciary capacity under section 1132(c)).

Count VI of the Plaintiff's Amended Complaint (filing no. 38)

Canada Life requests summary judgment on Count VI (labeled "No Change in Premium as a result of 60-Month Purported Amendment") of Ross' Amended Complaint (filing no. 38). In Count VI of his Complaint, Ross asserts that there should have been a reduction in the amount of money deducted from Ross' paycheck after adoption of the 1991 Policy amendment resulting in reduced coverage. Because the deduction from his paycheck was not reduced, Ross contends that he is entitled to reinstatement of the full extent of coverage existing prior to 1991. Canada Life contends that it should be granted summary judgment on Count VI because "Canada Life is not sure that this Count states a cause of action under ERISA or that a mere miscalculation in the amount deducted from a participant's paycheck would necessarily nullify the otherwise valid terms of a bargained for insurance contract." (Br. of Def. Canada Life in Support of Mot. for Summ. J. at 21)

The court agrees with Canada Life's view of Count VI. The Court has determined in this Memorandum and Order that the Policy was validly amended in 1991. In arriving at this conclusion, the court found that Rail Car requested that Canada Life amend the Policy in 1991 in order to offset increases in the Policy's premiums. Thus, rather than asking its employees to pay more for the same amount of coverage under the Policy, Rail Car decided to reduce the amount of coverage under the Policy and thereby maintain the amount then – currently deducted from the paychecks of Rail Car's employees. ERISA does not prohibit business decisions of this nature. *See Curtiss-Wright Corp.*, 514 U.S. at 78 ("ERISA does not create any substantive entitlement to employer-provided health

benefits or any other kind of welfare benefits," and employers are "generally free . . . , for any reason at any time, to adopt, modify, or terminate welfare plans."); *see also Inter-Modal Rail Employees Ass'n*, 520 U.S. at 515 (noting that giving employers the ability to amend an ERISA welfare plan "encourages them to give more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour."). Regardless, Canada Life was not the party that calculated Plan participant contributions or deducted those contributions from the participants' paychecks. Both actions were taken by the Plan participants' employer, Rail Car. (filing no. 94 Ex. 5 at 21:2-10; 71:4-72:16) Accordingly, because there is no genuine issue as to any material fact in Count VI of Ross' Amended Complaint (filing no 38), Canada Life is entitled to a judgment as a matter of law on Count VI.

Count VII of the Plaintiff's Amended Complaint (filing no. 38)

Canada Life requests summary judgment on Count VII (labeled "Failure to Give Notice – Breach of Fiduciary Duty") of Ross' Amended Complaint (filing no. 38). In Count VII of his Complaint, Ross asserts that Canada Life "had a fiduciary duty to give notice to Mr. Ross of the known impeding [sic] 60-month purported amendment." (filing no. 38) Canada Life contends that is should be granted summary judgment on Count VII, because "Canada Life did not have a fiduciary responsibility to furnish Plan participants with notice of Policy amendments." (Br. of Def. Canada Life in Support of Mot. for Summ. J. at 17)

"A fiduciary within the meaning of ERISA must be someone acting in the capacity of manager, administrator,

or financial adviser to a 'plan' . . . . " *Pegram v. Herdrich*, No. 98-1949, 2000 WL 743301, *7 (U.S. June 12, 2000). As the Plan's sole claims administrator, Canada Life was a Plan fiduciary. However, this does not mean that Canada Life was a fiduciary as to every function performed in regards to, or on behalf of, the Plan:

> [ERISA] does not describe fiduciaries simply as administrators of the plan, or managers or advisers. Instead it defines an administrator, for example, as a fiduciary only "to the extent" that he acts in such a capacity in relation to a plan. 29 U.S.C. § 1002(21(A). [sic] In every case charging breach of ERISA fiduciary duty, then, the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint.

Id. at *8; *see also Molasky v. Principal Mut. Life Ins. Co.*, 149 F.3d 881, 884 (8th Cir. 1998) ("[F]iduciary status is not an all-or-nothing concept . . . . A court must ask whether a person is a fiduciary with respect to the particular activity in question.") (internal quotation marks omitted).

Because Canada Life was the Plan's sole claims administrator, Canada Life acted in a fiduciary capacity pertaining to the administrative duties regarding claims. However, Canada Life was not a fiduciary for the issuance of notice to Plan participants regarding material modifications in the Plan. "It is well established that insurers who . . . are not plan administrators have 'no ERISA fiduciary duty to notify plan participants and beneficiaries, unless the policy documents or the insurer's past practices have created an obligation to communicate directly with them.'"

Id. (quoting *Kerns v. Benefit Trust Life Ins. Co.*, 992 F.2d 214, 216 (8th Cir. 1993)). Nowhere in the Plan documents is there a requirement that Canada Life communicate directly with Plan participants regarding modifications in the Plan. Nor did Canada Life ever assume any of the Plan administrator's duties with respect to the dissemination of information regarding the Plan. Accordingly, because Canada Life acted in a fiduciary capacity only when engaged in its claims administrative duties, Canada Life can not be held liable as a fiduciary for failing to give notice to Ross of the 1991 Policy amendment. Such notification was solely the Plan administrator's responsibility. Therefore, because there is no genuine issue as to any material fact in Count VII of Ross' Amended Complaint (filing no. 38), Canada Life is entitled to a judgment as a matter of law on Count VII.

Count VIII of the Plaintiff's Amended Complaint (filing no. 38)

Canada Life requests summary judgment on Count VIII (labeled "ERISA Procedural Defects Affecting Substantive Rights") of Ross' Amended Complaint (filing no. 38). In Count VIII of his Complaint, Ross asserts that Canada Life's failure to comply with certain procedural requirements of ERISA warrants substantive relief. (filing no. 38) Canada Life contends that summary judgment is appropriate on Count VIII, because "Canada Life was neither an administrator as defined by ERISA, nor had fiduciary responsibilities running to the Plaintiff with respect to the dissemination of information concerning the Plan . . . . " (Br. of Def. Canada Life in Support of Mot. for Summ. J. at 23)

The Court agrees with Canada Life's view of Count VIII. The Court has determined in this Memorandum and Order that Canada Life was not the Plan administrator nor a fiduciary regarding notice to Plan participants relative to modifications of the Plan. Canada Life was the administrator of claims under the Plan and substantially complied with applicable ERISA administrative review procedures governing a claims administrator. However, even if Canada Life failed to comply with certain ERISA procedural requirements, there is no evidence of bad faith, active concealment, or detrimental reliance that would justify granting Ross a substantive remedy for any technical violation of the ERISA's procedural requirements.

Accordingly, because there is no genuine issue as to any material fact in Count VIII of Ross' Amended Complaint (filing no. 38), Canada Life is entitled to a judgment as a matter of law on Count VIII.

THEREFORE IT IS ORDERED:

(1) That filing no. 49, the "Plaintiff's First Motion for Summary Judgement and Request for Oral Argument," filed by the plaintiff, James B. Ross, is denied;

(2) That filing no. 93, the "Motion of Defendant Canada Life for Summary Judgment and Request for Oral Argument," filed by the defendant, the Canada Life Assurance Company, is denied regarding oral argument, but otherwise granted;

(3) That because Rail Car America, Inc. is no longer a defendant in this action, Count V of the plaintiff's Amended Complaint (filing no. 38) is dismissed;

(4) That filing no. 100, the "Plaintiff's Motion in Limine and Motion to Strike," filed by the plaintiff, James B. Ross, is denied as follows:

> (a) The Plaintiff's Motion in Limine to prohibit the testimony of any expert on the defendant's behalf is denied as moot in view of this Memorandum and Order;
>
> and
>
> (b) The Plaintiff's Motion to Strike Canada Life documents CL0000001 through CL0001126 is denied as the court has determined that good cause exists to receive evidence outside the administrative record; and

(5) That pursuant to Fed. R. Civ. P. 58, a separate Judgment will be filed on this date in accordance with this Memorandum and Order.[6]

DATED this 15th day of June, 2000.

BY THE COURT:

/s/ Thomas M. Shanahan
THOMAS M. SHANAHAN
United States District Judge

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[6] Through an apparent abundance of caution, Ross named Rail Car America Group Disability Income Plan as a defendant to this action. However, because both Rail Car (the plaintiff's employer and Plan administrator) and Canada Life (the Plan's claims administrator) are no longer defendants to this action, the court will dismiss any remaining allegations against Rail Car America Group Disability Income Plan as moot.

Appendix C: Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Rehearing En Banc Entered May 16, 2002.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2800

James B. Ross, Appellant, v. Rail Car America Group Disability Income Plan, et al., Appellees.	x x x x x x x	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Riley did not participate in the consideration or decision of this matter.

(5128-010199)

May 16, 2002

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix D: Statutes Involved in this case.

1. ERISA Statutes:

a. §16(A):

"The term administrator means –

(i) the person specifically so designed by the terms of the instrument under which the plan is operated * * * "

b. §104(b)(2):

"The administrator shall make copies of the latest updated summary plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations)."

c. §104(b)(4):

"The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence."

d. §402(a)(1):

"Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."

e. §402(b)(3):

"Every employee benefit plan shall –

* * *

provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan * * *."

f. §502(a)(1)(B):

"A civil action may be brought –

(1) by a participant or beneficiary –

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan * * * "

g. §502(a)(3):

"A civil action may be brought –

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such

violations or (ii) to enforce any provisions of this title or the terms of the plan * * * ."

h. §502(c)(1):

"Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 or section 101(e)(1) with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation."

i. §402(d):

"(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of

legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title."

j. §503:

"In accordance with regulations of the Secretary, every employee benefit plan shall –

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim."

2. 28 U.S.C. §1746:

"Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced,

established or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)'.

(2) If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

3. §266 of the Canada Business Corporation Act:

"266.(1) Certificate that may be signed by directors, etc.

266. 266.(1) A certificate issued on behalf of a corporation stating any fact that is set out in the articles, the by-laws, a unanimous shareholder agreement, the minutes of the meetings of the directors, a committee of directors or the shareholders, or a trust indenture or other contract to

which the corporation is a party, may be signed by a director, an officer or a transfer agent of the corporation.

266.(2) Evidence being proof.

266.(2) When introduced as evidence in any civil, criminal or administrative action or proceeding,

(a) a fact stated in a certificate referred to in subsection (1);

(b) a certified extract from a register of a corporation required to be maintained by this Act; or

(c) a certified copy of minutes or extract from minutes of a meeting of shareholders, directors or a committee of directors of a corporation, is, in the absence of evidence to the contrary, proof of the facts so certified without proof of the signature or official character of the person appearing to have signed the certificate."

Appendix E: Regulations Involved in this Case.

1. 29 C.F.R. §2560.503-1(g)(1)(ii) (as it existed at the time of Mr. Ross' administrative appeal):

> "Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:
>
> * * *
>
> (ii) Review pertinent documents * * * "

2. 29 C.F.R. §2560.503-1(h)(1)(i) (as it existed at the time of Mr. Ross' administrative appeal):

> "A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review."